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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 940

UNITED STATES OF AMERICA, EX REL. JOSEPHINE JUMP, NEE STRIKEAXE, AND JOE S. MCGUIRE, GUARDIAN OF JAMES STRIKEAXE, AN INCOMPETENT, PETITIONERS

v.

HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 43–50) is reported in 117 F. 2d 769. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on December 30, 1940 (R. 50–51). A petition for rehearing filed on January

14, 1941, was denied February 15, 1941 (R. 51). The petition for a writ of certiorari was filed on April 11, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in the absence of an allegation that Bennie Strikeaxe was living on January 1, 1906, the Secretary of the Interior's refusal to recognize Strikeaxe as a duly enrolled member of the Osage Tribe of Indians under the Osage Allotment Act of 1906 should be overturned in a mandamus action instituted twenty-nine years after the Osage membership roll had been approved by the Secretary's predecessor and had (by the terms of the 1906 Act) become "final".

STATUTE INVOLVED

The pertinent provisions of the Osage Allotment Act of June 28, 1906, c. 3572, 34 Stat. 539, are set out in the Appendix.

STATEMENT

The petitioners, Josephine Jump and James Strikeaxe, are the children of Bennie Strikeaxe, a deceased Osage Indian (R. 2). They seek by mandamus to compel the Secretary of the Interior to recognize in Bennie Strikeaxe, and in them as his sole heirs, the right to participate in the distribution of Osage tribal funds (R. 16). They contend

that Bennie Strikeaxe was on "the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, *as it existed on the first day of January, nineteen hundred and six,*" [1] and that he was therefore entitled, by the express terms of the Osage Allotment Act of June 28, 1906, c. 3572, 34 Stat. 539, to share in the distribution of tribal lands and funds (R. 2–16).

The essential facts, as set out in the petition for mandamus, are these: Commencing in the '90's, Bennie Strikeaxe (by virtue of his tribal membership) received from the Government a quarterly annuity from the income of the Osage tribal land fund.[2] Prior to each quarterly payment in March, June, September, and December, the Osage Agent prepared in duplicate, on forms supplied by the Department of the Interior, a record known as the Annuity Pay Roll (R. 2–7). This pay roll contained the names of those persons entitled to participate in the distribution of tribal annuities, the age and sex of the annuitant, his or her number on the current and preceding pay roll, with appropriate spaces for signatures, dates of payment, and "remarks" (R. 18). Bennie Strikeaxe's name appeared on quarterly annuity pay rolls prior to and including the one for Decem-

[1] Italics supplied throughout this brief.

[2] See Act of August 19, 1890, c. 807, 26 Stat. 336, 344.

ber 1905, where he is listed as No. 588.[3] His annuity for that quarter was collected on December 13 (R. 18). No notation of his death was placed on that pay roll "until on or after February 21, 1906" (R. 8).[4] Notwithstanding the fact that Bennie Strikeaxe's name was on the Annuity Pay Roll "as it existed on January 1, 1906" (R. 8, 9), his name was not placed on the final tribal roll prepared by the local agent and approved by the Secretary of the Interior in 1908 (R. 12–14). Petitioners accordingly contend that their father's name was omitted without authority of law, that the Secretary should be required to include the name of Bennie Strikeaxe on the final roll, and that they are entitled to share as his heirs in all per capita distribution of Osage mineral royalties and other tribal property.[5]

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[3] His name was also included in the March 1906 pay roll pursuant to a provision of the Secretary's regulations allowing the name of a deceased Indian to be carried on one pay roll after death (R. 5). *Jump* v. *Ellis*, 100 F. 2d 130, 131 (C. C. A. 10).

[4] Petitioners have avoided any allegation that Bennie Strikeaxe was living on January 1, 1906. They simply allege that his name was on the Annuity Pay Roll "as it existed" on that date (R. 9, 11, 12), and they make no direct mention in this suit of the notation which appears on the December 1905 pay roll showing that Bennie Strikeaxe "Died Dec. 28/05". That fact, however, appears in a connected suit in which these same petitioners unsuccessfully sought to expunge that notation from the records of the Osage Agency. *Jump* v. *Ellis*, 22 F. Supp. 380 (N. D. Okla.), affirmed, 100 F. 2d 130 (C. C. A. 10), certiorari denied 306 U S. 645.

[5] Petitioners already share in their own right in all distributions of Osage Tribal funds (R. 2, 15).

The Secretary appeared and moved to dismiss the petition on various grounds (R. 24). The district court granted the motion to dismiss (R. 39), and the court of appeals affirmed (R. 50). It held that the Secretary was not required to include the name of Bennie Strikeaxe on the final roll unless Strikeaxe was alive on January 1, 1906, and that in the absence of any allegation that Strikeaxe was alive on that date the court would not grant the extraordinary remedy of mandamus, particularly in view of the long delay of the petitioners in bringing suit (R. 44–50). The affirmance was "without prejudice", presumably meaning without prejudice to petitioners' right to file a new petition alleging that Strikeaxe was alive on January 1, 1906 (R. 50).

ARGUMENT

1. The Osage Allotment Act, set out *infra*, p. 12, provided for the division of the entire tribal property among the members of the tribe.[6] Petitioners' contention is that under the Act one whose name was on the Osage Annuity Pay Roll for December, 1905, "as it existed on January 1, 1906," was en-

[6] In the absence of statutory provision to the contrary, the general rule is that the right of individual Indians to share in tribal property, whether lands or funds, depends upon tribal membership, and that right is ended when membership in the tribe terminates either by death or by severance of tribal relations. *Wilbur* v. *United States*, 281 U. S. 206, 216; *La Roque* v. *United States*, 239 U. S. 62, 66; *Sizemore* v. *Brady*, 235 U. S. 441, 446; *Gritts* v. *Fisher*, 224 U. S. 640, 642.

titled to participate in the distribution of the tribal property whether or not he was in fact alive on the latter date. In holding to the contrary the court below followed its earlier decision in *Ickes* v. *Pattison,* 80 F. 2d 708, where precisely the same contention was made and rejected.[7] This Court denied certiorari in the *Pattison* case, 297 U. S. 713, and no new reason is now presented for reviewing the issue. Rather the further passage of time militates against upsetting the accepted construction of the statute.

The holding below follows the contemporaneous departmental construction of the Allotment Act, announced in 1906 in an opinion of the Assistant Attorney General for the Department of the Interior (quoted in *Ickes* v. *Pattison,* 80 F. 2d at 710):

> January 1, 1906, is the important date in this legislation. It is clearly intended that all members of the tribe *in being on that day* shall share in the distribution of the tribal property. The lands and funds of the tribe were communal property in which no individual held a separate interest or one that would descend at his death to his heirs. By death the interest of the individual in the tribal property terminated.

[7] In accord with the *Pattison* decision and the decision below in the present case is *Jump* v. *Ellis*, 22 F. Supp. 380 (N. D. Okla.), affirmed on another ground, 100 F. 2d 130 (C. C. A. 10), certiorari denied, 306 U. S. 645. See also *In re Pitt's Guardianship*, 115 Okla. 116, 117, 242 Pac. 1036 (1925).

> *Only those living January 1, 1906, had any interest therein that day.* None could claim any interest by inheritance, but held alone by virtue of his personal right of membership in the tribe. The membership of the tribe as it was constituted January 1, 1906, must be treated as the thing had in view by the law. *An individual who died before that date was not then a member of the tribe,* and for the purposes of division of the tribal property under this act it must be considered that his name was *erased* from the tribal roll *at the time of his death.*

Congress appears tacitly to have accepted this construction: although the Act has been repeatedly amended in other particulars,[8] Congress has expressed no dissatisfaction with the construction which the courts and the Department have placed on Section 1.

The Act did not, as petitioners insist (Pet. 12), confirm any single document as conclusive evidence of tribal membership. Congress did not make the quarterly Annuity Pay Roll for December 1905 a final record of tribal membership, as, for example, it did Dunn's roll of the Creek freedmen.[9] Instead the Osage Allotment Act provides that "the roll of

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[8] Joint Resolution of February 27, 1909, 35 Stat. 1167; Act of April 18, 1912, c. 83, 37 Stat. 86; Act of March 3, 1921, c. 120, 41 Stat. 1249; Act of April 12, 1924, c. 95, 43 Stat. 94; Act of March 2, 1929, c. 493, 45 Stat. 1478; Act of June 24, 1938, c. 645, 52 Stat. 1034.

[9] Act of June 28, 1898, c. 517, 30 Stat. 495, 503.

the Osage tribe of Indians, as shown by the *records* of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, 1906 * * * is hereby declared to be the roll of said tribe and to constitute the legal membership thereof." Moreover, Indians known to be dead continued to be listed on the annuity pay rolls for one quarter after death so as to provide moneys for burial expenses (R. 5). In view of this circumstance it is not to be supposed that Congress intended the December pay roll to constitute the membership roll of the tribe.

Knowing that the 1906 Act has been consistently construed as excluding Indians who died before January 1, 1906,[10] petitioners nonetheless make no averment in their petition for mandamus that Bennie Strikeaxe was alive, or that the records of the agency show that he was alive, on that date. They simply allege that he was on the Annuity Pay Roll "as it existed on January 1, 1906." Such an averment, in the light of the foregoing authorities, is insufficient to show that Bennie Strikeaxe was

[10] Petitioners are represented in this case by the same counsel who represented them in the district court in Oklahoma, where they sought without success to expunge from the records of the Osage Agency the notation that Bennie Strikeaxe had "Died Dec. 28/05." *Jump* v. *Ellis*, 22 F. Supp. 380.

wrongfully deprived of an Osage "headright" or that he was unlawfully omitted from the final roll of the Tribe approved by the Secretary in 1908 (R. 12–14). As the court below held, to be entitled to mandamus the petitioners must show a clear right to the relief sought. Equivocal and inconclusive allegations will not suffice. *Life and Fire Insurance Co.* v. *Wilson,* 8 Pet. 291, 302; *Reeside* v. *Walker,* 11 How. 272, 289; *Redfield* v. *Windom,* 137 U. S. 636, 644; *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543. Thus the present complaint, by failing to allege that Bennie Strikeaxe was alive on January 1, 1906, omits a fact essential to the establishment of petitioners' claim.

It may be conceded, as petitioners contend (Pet. 2, 3, 12, 23), that a person who has been placed on an *approved* roll, and has thereby acquired certain property rights, cannot be removed therefrom without notice or an opportunity to be heard or without a right of appeal to the courts. *Garfield* v. *Goldsby,* 211 U. S. 249; see opinion of the court below (R. 47–48). But such are not the facts of the present case. Bennie Strikeaxe's name was never placed on the final roll approved by the Secretary of the Interior in 1908 (R. 14). The mere fact that it appeared on a "tentative roll" does not mean that it cannot be summarily omitted from the final roll. *Johnson* v. *Payne,* 253 U. S. 209, 211; cf. *Turner* v. *Fisher,* 222 U. S. 204, 209. Nor does

its omission render the approved roll any the less "final".

2. The equitable principles which guide a court in the issuance of mandamus (*United States* v. *Dern,* 289 U. S. 352, 359) would alone require denial of the writ in the present case. As the court below pointed out (R. 48–50), this action was begun twenty-nine years after the final roll of the Osage Tribe was approved. Under the Act both tribal lands and tribal funds were divided among the members of the tribe. *La Motte* v. *United States,* 254 U. S. 570, 572. If the Osage roll were now to be opened for review, it would be possible for every person named on the December pay roll but omitted from the final and approved roll to claim enrollment to the detriment of those already enrolled. The rights of these absent parties should not now be clouded at the behest of the petitioners. A claim involving such mischievous consequences cannot commend itself to a court exercising discretionary jurisdiction and guided by equitable principles. As Justice Brandeis remarked in *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311, mandamus does not issue "to direct an act which will work a public or private mischief."

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a

question of general importance. The petition should therefore be denied.

Respectfully submitted.

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